

FCC MAIL SECTION

~~Federal Communications Commission~~

DA 00-602

MAR 22 3 46 PM '00

DISC 1111

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)	
)	
Amendment of Section 73.202(b))	MM Docket No. 95-83
Table of Allotments,)	RM-8634
FM Broadcast Stations)	
(Littlefield, Wolfforth and Tahoka, Texas))	

MEMORANDUM OPINION AND ORDER

(Proceeding Terminated)

Adopted: March 8, 2000**Released: March 20, 2000**

By the Chief, Allocations Branch:

1. The Commission has before it a Petition for Partial Reconsideration filed by 21st Century Radio Ventures, Inc. ("21st Century") directed to the Report and Order in this proceeding 12 FCC Rcd 3215 (1997) which denied a proposal to reallocate a channel from Littlefield to Wolfforth, Texas. Comments were filed by Albert Benavides, ("Benavides"). An Opposition was filed by El Paso and Lubbock, Inc. 21st Century filed a Reply. We will grant the Petition for Partial Reconsideration.

2. Background. At the request of 21st Century, permittee of Station KAIQ, Littlefield, Texas, we adopted a Notice of Proposed Rulemaking, 10 FCC Rcd 6598 (1995) ("Notice"), proposing the reallocation of Channel 238C3 from Littlefield to Wolfforth, Texas and modification of the Station KAIQ construction permit to specify Wolfforth as its community of license. In order to accommodate this reallocation, the Notice also proposed either the deletion of Channel 237A at Tahoka, Texas or the substitution of Channel 278A for Channel 237A at Tahoka. The Report & Order denied 21st Century's request to reallocate Channel 238C3 from Littlefield to Wolfforth and took no action on the issue of the deletion or substitution of Channel 237A at Tahoka, TX.

3. Petition for Partial Reconsideration. 21st Century filed a Partial Petition for Reconsideration of the Report & Order requesting that the Commission reconsider its decision not to take action with respect to the deletion or substitution of Channel 237A at Tahoka. Specifically, 21st Century argues that by substituting Channel 278A for Channel 237A, it will be able to specify a new transmitter site at Littlefield for Channel 238C3 that will permit it to maximize its facilities and bring service to the greatest number of people possible.¹ In addition, a preferential arrangement of allotments will occur, as a second local service will be brought to Tahoka. 21st Century contends that granting its request on reconsideration will conserve Commission resources since the public has already received notice of the proposed action and had an opportunity to comment. 21st Century maintains that the Commission should substitute Channel 278A for Channel 237A because, together with its proposed relocation of its

¹ 21st Century preferred transmitter site for Channel 238C3 at Littlefield is currently short-spaced to Channel 237A at Tahoka.

transmitter site this will result in a greater public interest benefit.²

4. Benavides does not object to the proposed channel substitution inasmuch as it would provide a preferential arrangement of allotments. Benavides does object to any proposal to entirely delete Tahoka from the FM Table of Allotments which would prejudice his pending application (File No. BPH-950824MC). Benavides requests that the Commission immediately process his application and grant a construction permit for the channel at Tahoka.

5. Opposition. EPL argues that the Petition for Partial Reconsideration should be denied because it is an untimely counterproposal seeking to substitute Channel 278A for Channel 237A. EPL further argues that neither the Petition for Rule Making, nor comments in the proceeding proposed the channel substitution now sought by 21st Century petitioner. EPL claims that the Notice leaves no doubt that any channel substitution was to be contingent on an expression of interest in Channel 237A and the reallocation of Channel 283C3 to Wolforth. Finally, EPL states that the Commission's Rules and the Notice make clear that counterproposals may only be considered if raised in initial comments, 47 C.F.R. §1.420(d) and the Appendix to the Notice. As such, the petition should be denied because it introduces new facts into the proceeding without any attempt to satisfy the requirements of Section 1.429(b) of the Commission's Rules.³

6. Reply. 21st Century disagrees that this is a late-filed counterproposal. 21st Century argues that the issue was presented in the Notice. 21st Century points out that Section 553 of the Administrative Procedure Act demands only that reasonable and fair notice be given of a proposed action in an NPRM.. Such notice was clearly given in the Notice in this proceeding and a decision on the issue may be said to be the "logical outgrowth" of the proposed substitution set forth in the Notice. See, Pinewood, South Carolina, 4 FCC Rcd 8536 (1989). 21st Century argues that in the Notice the Commission sought expressions of interest in Channel 237A and noted that if there were expressions of interest the Commission proposed to substitute Channel 278A for Channel 237A. Thus the public had ample opportunity to comment on the merits of the substitution of Channel 278A for Channel 237A.

7. Discussion. We will grant 21st Century's Petition for Partial Reconsideration. We disagree that a channel substitution constituted an untimely counterproposal and should therefore be dismissed. The original Notice specifically requested comments regarding either the deletion of Channel 237A at Tahoka or the substitution of Channel 278A for Channel 237A. Parties had full opportunity to address the issue of retention of the channel, or the substitution of another channel and relevant reasons to

² 21st Century estimates that from its current site it will only serve 11,914 people. Even assuming maximum facilities at its current site, petitioner will only serve 35,214 people. By changing its site 21st Century petitioner expects to maximize facilities and serve 229,258 people.

³ EPL cites Churubusco, Huntington, Roanoke and South Whitley, Indiana, 4 FCC Rcd 5045 (1989), *aff'd*, 5 FCC Rcd 916 (1990); Scranton and Surfside Beach, South Carolina, 4 FCC Rcd 2366 (1989); Keokuk, Iowa, 4 FCC Rcd 7467 (1989); Marietta, Ohio and Ravenswood, West Virginia, 3 FCC Rcd 360 (1988).

support their arguments.⁴ We believe that the Notice adopted in this proceeding complied with the Administrative Procedure Act because it gave interested parties an opportunity to comment on the merits of the substitution of Channel 278A for Channel 237A in Tahoka. The fact that we initially decided not to make a change in Tahoka in light of our decision to keep Channel 238C3 in Littlefield does not diminish the effect of the Notice nor preclude our ability to make further changes before the action becomes final.⁵

8. Regarding 21st Century's proposal, an application to change a transmitter site is generally regarded as a benefit to the licensee rather than the public unless the licensee can demonstrate an overriding public interest justification. See Andalusia, Alabama, 49 FR 32201 (1984). However, we believe in this case 21st Century has made a sufficient public interest justification to warrant grant of its request. Our staff has confirmed petitioner's showing that at its new site it will be able to provide additional service to over 229,000 persons versus a maximum of 35,000 persons at its current site. Although there will be a "loss" in service to over 17,600 persons, since the authorized station is unbuilt and has never been on the air. As such, the loss is theoretical and does not represent an actual loss of service.

9. We believe the public interest would be served by substituting Channel 278A for Channel 237A at Tahoka. Channel 278A can be allotted to Tahoka, in compliance with the minimum distance separation requirements of the Commission's Rules, provided there is a site restriction of 5.6 kilometers (3.5 miles) northeast of the community.⁶

⁴ §553 of the Administrative Procedure Act requires that a rule making proceeding provide adequate notice and fair opportunity for interested parties to participate and present relevant information. It well is established that the final adopted rule need not be identical to the proposed rule. Rather to comply with the requirements of §553(b)(3) of the APA, it must be "logical outgrowth" of the rule making proceeding. See Owensboro on the Air v United States 262 F.2d 702 (D.C. Cir. 1958) This means, in effect, that a NPRM must fairly apprise interest persons of the subject and issues before the agency to set forth a range of likely alternatives so that individuals may know whether their interests are "at stake". See Weyerhaeuser Company v Costle, 590 F.2d 1011(D.C. Cir. 1978).

⁵While the Commission has rejected attempts to introduce counterproposals in petitions for reconsideration, the cases cited by EPL do not support denial of 21st Century's request in this proceeding. In Churbusco the petitioner seeking reconsideration raised channel class concerns that it failed to raise before the close of the initial comment period. Petitioner's arguments were rejected for being untimely and outside the scope of the proceeding. The Commission reiterated that it can on its own motion consider equivalent class channels to resolve conflicts as per Paragraph 3© of the standard Appendix to notices of proposed rule making for allotment proceedings. In Scranton the petitioner seeking reconsideration sought to propose a new community that was not originally identified in the Notice, the opposite is true here. Likewise, in Keokuk the petitioner again proposed a channel that was not originally identified in the Notice, thus giving rise to possible violations of the notice and comment provisions of the Administrative Procedures Act. Again, the opposite is true here. Finally, in Marietta an attempt to revive a defective counterproposal was unsuccessful since the community in question had never actually been part of the proceeding, consequently the petition was denied.

⁶The coordinates for Channel 278A at Tahoka are North Latitude 33-11-34 and West Longitude 101-44-44. Albert Benavides will be permitted to amend his pending application (File No. BPH-950824MC) to specify operation on Channel 278A without loss of cut-off protection.

10. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective May 3, 2000 the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, as follows:

Community	Channel Number
Tahoka, Texas	278A

11. In view of the above, IT IS ORDERED, That the Petition for Partial Reconsideration filed by 21st Century Radio Ventures, Inc. IS GRANTED.

12. IT IS FURTHER ORDERED, That this proceeding is TERMINATED.

13. For further information concerning this proceeding, contact Arthur D. Scrutchins, Mass Media Bureau, (202) 418-2180.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Mass Media Bureau